HM Treasury

Recovery of public sector exit payments:

government response to the consultation

October 2014

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Contents

1 Summary

1.1 The government announced in the Queen's Speech on 5 June 2014 the intention to limit excessive redundancy payments across the public sector.

1.2 On 25 June 2014 the government published a consultation document which looked to establish nationally determined rules requiring high paid employees that leave and re-join the same part of the public sector within a year to return some or all of any exit payments that they have received. This consultation closed 12 weeks later, on 17 September 2014.

1.3 This measure follows a number of recent high profile cases where individuals have received large exit payments and quickly returned to public sector roles. The Health Select Committee found among 19,000 NHS redundancies, 17% had been rehired and most within a year[1]. An Audit Commission report in 2010 found that of 37 chief executives who left by mutual agreement over a two year period from January 2007, six had been employed in another council within 12 months[2]. In such circumstances, the justification of financial support to bridge the gap to new employment is undermined and this represents poor value for money.

1.4 The core elements of the government's proposal were to:

- Require high earning public sector employees or office holders to repay a broad definition of exit payments should they return to the public sector within 12 months on a pro rata basis.
- Apply these measures to employees moving between the same part (or 'sub sector') of the public sector, with the definition of these sub-sectors to be determined as part of the consultation.
- Define higher earners as any individual earning above £100,000. Below this threshold a taper would apply – down to a second earnings threshold (proposed to be in the region of £80,000).
- Make changes that represent a baseline legal requirement. Where employers' existing or proposed policies go further these measures will support rather than replace them.

1.5 In light of consultation responses the government will continue to seek to legislate for the majority of the proposals outlined above. However, building on information received changes will be made to:

- Reduce the number of payments subject to recovery, to only include those payments that relate to loss of employment.

[1] Health Select Committee evidence for inquiry into: Public expenditure on health and social care Seventh Report of Session 2013–14. http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/4813

[2] Managing early departures in central government, National Audit Office, March 2012. http://www.nao.org.uk/report/managing-early-departures-in-central-government/

- To exclude the Bank of England and public broadcasters from the scope of this policy and to place some public sector regulators and the Office of National Statistics into their own independent sub-sectors.
- To remove the second earnings threshold for which a proposed taper of recovery would have applied.

1.6 The government will take forward these proposals by taking powers in primary legislation as part of the Small Business Enterprise and Employment Bill with the measures being implemented through secondary legislation no later than April 2016.

2 Outline of government proposals

2.1 These proposals will:

- Require all individuals earning over £100k per annum to repay a portion of their exit payment where they are re-hired within sub-sectors within 12-months.
- Define sub-sectors based around central government departments and their Whole Government Account reporting boundaries.
- Allocate each public corporation and local government body to a single sub-sector, based on grouping similar workforces together or on the parent department's responsibility over the policy area.
- Require the repayment of all payments related to loss of employment including pensions (please see Chapter 6 for more details). However, exclude payments in lieu of notice, and those payments that have a potential, if not actual, monetary value. The government will also exclude the recovery of employer payments to buy out actuarial reductions to pensions where an individual has an established legal right to an unreduced pension under the scheme rules (e.g. Local Government Pension Scheme).
- Require the old employer to inform the individual of their obligation and ensure the exit payment is recovered; require the new employer to not engage the individual until confirmation recovery arrangements have been agreed; and, in cases of a waiver, require the body that received the waiver to disclose this in their Annual Reports and Accounts.
- Allow employers the discretion to give individuals credit for previous service, where recovery of payments occurs and the contract of employment is later terminated at the employer's request.
- Reduce the amount of exit payment due to be recovered where individuals return on a lower pensionable pay.
- Recover exit payments in cases where an individual returns off-payroll to a similar role within their sub-sector.
- Require by default the Secretary of State of the parent department of each sub-sector to take the decision over whether to grant a waiver to an individual to remove the obligation to repay, or to delegate this power to an appropriate person (e.g. the Accounting Officer).
- In local government require the Full Council to take the decision whether to grant a waiver for repayment in cases involving Local Authorities, and for the local government bodies for which they have oversight or control. All waiver decisions will be subject to robust transparency and disclosure requirements.

- Enable the Office of National Statistics and some regulators to operate as individual stand-alone sub-sectors, due to their independent status, so that the recovery provisions only apply when an individual is re-hired by the same employer.
- Exempt the Commissioner for Irish Lights, some public financial corporations, National Museums, the Armed Forces, public broadcasters, and the Bank of England from the scope of recovery provisions.

2.2 Summary:

<table>
<tr><th colspan="2">Who is in Scope?</th></tr>
<tr><td>Earnings thresholds/ exemptions</td><td>• All public sector employees and office holders earning over £100k
• There will be no taper to a lower earnings threshold.</td></tr>
<tr><td>Which employees</td><td>• Current and future employees and office holders
• Individuals that return off-payroll to a similar role within their sub-sector.</td></tr>
<tr><td>Bodies in Scope</td><td>• All bodies within the ONS definition of public sector except:
o The following public financial corporations and subsidiaries:
▪ The Royal Bank of Scotland
▪ UK Asset Resolution
▪ Northern Rock
▪ Bradford and Bingley
▪ Pension Protection Fund
▪ The London Authorities Mutual Limited
▪ National Employment Savings Trust Corporation (NEST)
▪ Financial Conduct Authority
▪ Financial Ombudsman Service Ltd.
▪ First Rate Exchange Services Holdings Limited
▪ First Rate Exchange Services Limited
▪ Guaranteed Export Finance Corporation PLC (GEFCo)
▪ Northern Ireland Central Investment Fund for Charities
▪ Prudential Regulation Authority
o Armed Forces
o National Museums
o The Commissioners for Irish Lights
o Public broadcasters: BBC, Ch4,and S4C
o Bank of England

New independence category of individual bodies operating their own sub-sectors and waiver regime. This will include:
• Some regulators (e.g. Ofcom)
• The Office of National Statistics</td></tr>
<tr><th colspan="2">How will it work?</th></tr>
<tr><td>Mechanism</td><td>• Require the individual to notify possible new and previous employer where they return to the same sub-sector from which they received an exit payment from within 12 months.
• Require new employers to request information on previous redundancy payments as part of pre-employment checks and, where applicable, not employ the individual until after repayment arrangements have been finalised.
• Require old employers to make arrangements with individuals where exit payments are due to be recovered
• Allow employers the discretion to give individuals credit for previous service, where recovery of payments occurs and the contract of employment is later terminated at the employer’s request.
• Do not recover employer payments to buy out actuarial reductions to pensions where an individual has an established legal right to an unreduced pension under the scheme rules (e.g. Local Government Pension Scheme)</td></tr>
</table>

Which payments for recovery	• Payments for loss of employment including discretionary payments to buy out actuarial reductions to pensions and severance payments (see Chapter 6) Excluded are: • Payments in lieu of notice and other contractual entitlements unconnected to loss of employment • Those payments that have a potential, if not actual, monetary value • Payments made to buy out actuarial reductions to pension where an individual has an established right to an unreduced pension under the scheme rules.
Defining sub-sectors	• Defining sub-sectors with reference to the department to which the body reports for the Whole of Government Accounts. • Full lists of bodies in each sub-sector set out in legislation.
Amount to recover	• Full amount within 28 days • Pro rata up to 12 months • None after 12 months • Partial recovery where reemployment is on a lower salary • Partial recovery for individuals returning part-time • The amount of exit payment due to be recovered will be reduced subject to tax paid and any statutory entitlement.
Sanctions	• Civil recovery / Prohibition on taking up new role / Dismissal
Mechanism for Waiving	• Assigned to the relevant Secretary of State for each sub-sector • The Secretary of State can delegate this power to an appropriate person or persons (e.g. the Accounting Officer) • The Full Council to take the decision whether to grant a waiver from repayment in cases involving Local Authorities and for local government bodies within their delegated powers. • Remove the option for a Minister to be able to waive the recovery of an exit payment where Ministers or Parliamentary office holders return. • Reported and published as part of departmental accounting processes.
Mechanism for enforcement	• Old employers will have the right to take individuals to court to reclaim money • Old employer will be required to inform the individual of their obligation at the point of exit and to ensure the exit payment is recovered. • New employer will be required to not employ the individual until after repayment arrangements have been finalised
Devolution	• Our current proposal is for devolved bodies to be a part of the exit payment recovery process, and that devolved administrations will be responsible for waivers in their sub-sectors • The government has requested Legislative Consent Motions to legislate for the devolved administrations.
Transparency	• Require the body that received the waiver to disclose this in their Annual Reports and Accounts
Implementation Date	• Legislate and enact within the current parliamentary session • Require compliance with new arrangements by April 2016

3 Introduction

3.1 Exit payments are essential in their ability to allow employers to reform and react to new circumstances. They facilitate reorganisation and reform while providing support for employees that helps bridge the gap to new employment.

3.2 However, as well as helping employers implement wider reforms, at an individual level exit payments should be fair, proportionate and represent value for money to the tax payer. A key area in this regard is the issue of re-employment following redundancy. Employers will normally make every effort to find alternative employment for employees where their services are no longer required. However, the size and diversity of the public sector means that it is not uncommon for individuals made redundant from one employer to then find employment elsewhere in the same part of the public sector.

3.3 The core proposals in the government's consultation were:

- To require high earning public sector employees or office holders to repay exit payments should they return to the public sector within 12 months on a pro rata basis. Following similar principles to the Civil Service Compensation Scheme, individuals would be required to repay the full amount should they return before 28 days and a pro-rata amount should they return between 28 days and 12 months.
- To apply these measures to employees moving between the same part (or 'sub-sector') of the public sector, with the definition of these sub-sectors to be determined as part of the consultation. The lead option being to determine sub-sector by workforce and/or according to department with the detail of sub-sectors established in legislation to allow for the inclusion of all local government bodies and public corporations.
- To define high earners as any individual earning above £100,000. Below this threshold a taper would apply – down to a second earning threshold (proposed to be in the region of £80,000). For employees earning below this level any recovery arrangements would be determined by the employer or compensation schemes.
- To make these changes a baseline legal requirement. They would be focussed on the highest earners in order to guard against the most unfair and poorest value for money outcomes. Where employers' existing or proposed policy go further these measures will support rather than replace them.

3.4 The intent was for the policy to apply across as much of the public sector as possible with only a small number of exceptions. The public sector was defined as those entities classified as central or local government and non-financial public corporation sectors by the Office for National Statistics for National Accounts purposes. The government would also apply these measures to Ministers and their advisors, and Parliamentary post holders. For Members of Parliament, it will be for IPSA to decide whether equivalent arrangements should be implemented for MPs. The government's preference is that equivalent arrangements should be put in place.

3.5 There were 29 formal responses to the consultation. Those organisations that responded are listed in Annex A. Officials also engaged with a range of departments and Unions outside of the formal consultation process.

3.6 This document forms the government's response to this consultation.

3.7 Chapter 4 will address responses to the consultation document questions 1, 2, 3, 4, 5, 6, 16 and 17. This includes respondents' views on the government's proposals and details of some additional exit payment and recovery arrangements they were aware of that were not addressed in the consultation document.

3.8 Chapter 5 will look at consultation document questions 7, 12, 13, and 14. These asked respondents to comment on the proposed scope of the bodies and individuals included, including sub-sector definitions.

3.9 Chapter 6 will explore responses questions 8, 9, and 10. These provided responses with the opportunity to comment on whether they agreed with the list of exit payments included within the scope of the recovery mechanism and the proposed terms of recovery.

3.10 Chapter 7 focusses question 15 in the consultation document. This asked respondents to comment on whether they agreed with the government's proposed exemptions and waivers of recovery.

3.11 Finally Chapter 8 will cover question 11 in the consultation document on compliance and enforcement of recovery of exit payments. This section will also explore the proposed next steps for the policy.

4 Exit payments in the public sector

4.1 The consultation set out the importance that an exit payment for loss of employment can play both in supporting organisational reform and providing individuals with a financial bridge into new employment or until retirement. However, individual exit payments should be fair, proportionate and provide value for money to the taxpayer.

4.2 Exit payments should typically be made in cases when other avenues for employment have been exhausted, for example the scope for the employee to be redeployed elsewhere in the public sector. Or where the exit is for efficiency purposes and part of wider workforce reforms.

4.3 This section will address responses to the consultation document questions 1, 2, 3, 4, 5, 6, 16 and 17. These questions asked respondents to provide details of any additional exit payment and recovery arrangements they were aware of that were not addressed in the consultation document and to give their views on the government's proposals, providing alternatives where applicable.

Summary of responses

4.4 Most contributors agreed with the principle that exit payments are primarily for a loss of employment and so are difficult to justify when an individual returns to the same part of the public-sector shortly after leaving. They also agreed that it was reasonable to consider some sort of recovery provision.

4.5 However, some rejected the proposal because they felt legislating for this would cut across collectively agreed national, and local terms and conditions of employment. They were also cautious about the impacts of the policy and complexity, highlighting potential risks, including the impact on flexible retirement, potential for increased litigation, and a loss of talent from the public sector from fewer high calibre candidates applying for senior posts.

4.6 The government notes that where a public sector body has been abolished the provisions could also affect morale and retention of current staff members who would expect to retain exit payments in return for assisting with the wind-down period. Some contributors suggested that the government's focus should be on strengthening redeployment policies across the public sector to avoid redundancies in the first instance.

4.7 Responses also suggested that behavioural change could be affected by improving accountability through transparency and more stringent reporting across the public sector.

4.8 A number of respondents provided additional details on exit payment arrangements, outlined below.

Local Government

4.9 Local government contributors noted that the facility in the Local Government Pension Scheme (LGPS) to award added years of service was removed from the LGPS for terminations occurring after 31 March 2014. Under the LGPS Regulations (effective from 1 April 2014) the LGPS administering authority also has the discretion to abate the amount of pensions accrued up to 31 March 14 where an individual has been re-employed with an employer offering member of the LGPS.

4.10 Within local government if an employee unreasonably refuses an offer of suitable alternative employment within the four weeks before an employee is dismissed, the Employment Rights Act 1996 allows any individual employer to withhold statutory redundancy pay. Depending on a particular council's policy any excess contractual exit payment could also be withheld.

Local Government and the NHS

4.11 A suitable alternative offer of employment extends to those made from all bodies referenced under the Redundancy Payments (Continuity of Employment in Local Government, etc.) (Modification Order) 1999. A similar Modification Order applies to the National Health Service. These provisions apply across bodies within a particular part of the public sector in a similar way to the proposed sub-sector approach for the recovery of public sector exit payments.

Teachers

4.12 Exit payments for Teachers were revised further in 2006 following the implementation of age discrimination legislation and again by the Teachers Pensions Regulations 2010. Arrangements for lump sum exit payments for teachers, in addition to any statutory redundancy payments, are now made on a discretionary basis and would not necessarily be based on all of a teacher's continuous service.

Government response

4.13 The government welcomes the support of those respondents that agreed with the principles of the government's proposals and thanks those that provided additional detail.

4.14 The government believes that it is fair that where a high-paid individual, compensated for loss of employment from the public sector, returns within a short period of time, that they should be required repay a portion of the exit payment they received. As outlined in Chapter 1 the Health Select Committee and Audit Commission found about 16% of the NHS and the local government workers that they looked at respectively exited and returned within a year.

4.15 The government's proposals do not seek to replace but rather underpin current exit payment arrangements and will not affect an individual's entitlement to statutory redundancy. These reforms are forward-facing rather than retrospective and are proportionate given the overriding objectives of fairness and value for money.

4.16 The Government is carefully considering how to deal with exit payments that may be protected under the Transfer of Undertakings (Protection of Employment) Regulations 2006, as amended ('TUPE'). It is our intention to extend the scope of the regulations as far as we can, but we recognise that some TUPE protections that confer rights to exit payments may need to be upheld. We are working through these issues and will set out more detailed proposals when we consult on draft regulations.

4.17 The proposed recovery mechanism (examples outlined in Annex C) aims to ensure that an individual in scope of this policy, returning after 28 days but within 12 months, is only compensated for their lost employment, retaining a proportion of the exit payment which corresponds to their loss of earnings for the period they were out of employment. This ensures they are not unduly compensated at the tax payers' and public sector's expense.

4.18 The government acknowledges that in some exceptional circumstances flexibility will be necessary to ensure that the impacts of the recovery of exit payments is proportionate. The government will therefore introduce a waiver regime which will allow each Secretary of State of a subsector, or a delegated authority, to waive the recovery of payment. The government maintains, however, that in the majority of cases where highly paid individuals return shortly after an exit payment, the recovery of the excess compensation is fair.

4.19 The government supports increased workforce planning and transparency in the public sector to ensure that exit payments are used only in cases where alternative suitable employment is not available. These proposals are not intended to infringe on any work that is currently ongoing in these areas and will only apply where it is the government's view that an individual has been overly compensated for loss of employment.

5 Bodies and individuals in scope

5.1 The consultation set out the government's intent that the policy of recovering exit payments where an individual returns to the same part of the public sector after a short time, should apply across the public sector with only a small number of exceptions. The government proposed to use the Office of National Statistics classification of public sector bodies for National Accounts as the reference point for the public sector. This includes central and local government bodies, and public corporations.

5.2 To preserve flexibility in the labour market, the government proposed to only capture movements between similar jobs and organisations through the designation of "sub-sectors" as a lead option. The consultation document invited views on how best to define the sections of the public sector or "sub-sectors" within which redundancy payments would be recovered. The starting proposal was that these groupings of bodies would be based on the department to which the body reports for the Whole of Government Accounts.

5.3 The consultation proposed a number of exclusions from the scope of the policy, these have been looked at in Chapter 7.

5.4 The consultation document also set out that it would be for the devolved administrations to determine if and how they wanted to take forward similar arrangements in relation to devolved bodies and workforces. The government has requested Legislative Consent Motions to legislate for the devolved administrations.

5.5 Recovery provisions would apply to all existing and future employees of the organisations covered by the policy, including where there were existing high paid employees with contractual rights to an exit payment. In order to focus on the highest earners in the public sector a starting salary threshold was proposed at £100,000 with a potential taper down to £80,000. Further details of recovery provisions are set out in Chapter 6 with examples in Annex C.

5.6 This section will address responses to the consultation document questions 7, 12, 13, and 14. These questions asked respondents to comment on whether they agreed with the government's proposed scope of the policy, individuals included, and sub-sector definitions, providing alternatives where applicable.

Summary of responses

Bodies in scope

5.7 Most respondents understood the rationale for creating sub-sectors, the intention for recovery provisions to apply to movements between similar workforces, but sought further clarity about how the boundaries would be set. Sub-sectors should be easy to understand, with each body identified through a published list which is accessible to employers and employees.

5.8 Some submissions raised concerns about the possible impacts on labour mobility. Respondents argued that if the sub-sectors were defined too broadly this could create some instances where individuals are deterred from seeking alternative roles within the public sector, in cases of a significant change of roles and subsequent reemployment. Requests were received for a narrower scope for sub-sectors on the basis of retention and the difficulties with redeployment, for example to treat local government companies or academies as exempt or individual sub-sectors. While other respondents felt that using a sub-sector approach would not represent value for money because individuals moving to similar jobs in other sectors could retain their payment. There are a limited number of areas where this would apply; for example, there is a natural movement of staff between Local Authority Social Care and the NHS and specialist staff such as lawyers would find comparable jobs in any sector.

5.9 Opinion on the scope of sectors was therefore diverse, reflecting the wide ranging workforce arrangements and ensuring boundaries are set which deliver the policy without unintended consequences. Alternative proposals put forward include: recovering repayments for a return to employment anywhere in the public sector to avoid complexity; using non-legislative means such as more stringent transparency and reporting rules to affect change and focusing on redeployment.

5.10 The majority of respondents did not comment on alternatives to using the Office of National Statistics definition of public sector as the basis for determining organisations in scope except for the importance of ensuring any list was up to date.

Individuals in scope

5.11 A number of contributions raised concerns that the earnings thresholds and taper was complex and requested further clarification. Further clarity was also sought on how the taper would work around the boundaries of each earnings level. Contributors also questioned whether the taper represents value for money as the amount recovered falls rapidly towards the lower threshold. The administration cost would likely exceed the amounts recovered at the lower end of the taper.

5.12 There was widespread acceptance of a £100k threshold, although some respondents suggested there should be no earnings threshold whilst others preferred a criteria based on payment amount and not on salary.

5.13 Inclusion of consultancy work within scope also raised opposing views. Some respondents supported the proposal to recover payments, whilst others believed that this would result in a loss of the availability of experience and skills for employers. This would also likely deprive the employee of the opportunity to maintain skills and employability.

5.14 Concerns extended to the allowance for casual work if less than 15 days in any 91 consecutive days, which was considered by some respondents as too restrictive to be meaningful. For example, the amount of casual work permitted could be too small to provide the consistency of engagement required in some areas of the NHS for proper service delivery.

Government response

Bodies in scope

5.15 The government welcomes the support of most of responses that agreed with the sub-sector approach within this policy. However, the government also noted the request for further clarity on which bodies would be included within each sub-sector.

5.16 The government previously proposed to:

- Require the repayment of an exit payment where an individual in scope returns to the same sub-sector of the public sector;
- Define sub-sectors around departments reporting boundaries and their ALB’s; and

- Include all public sector bodies, as defined by the ONS, excluding the Armed Forces, some public financial corporations, and National Museums (see Chapter 7 for exemptions).

5.17 Following consultation responses the government now additionally proposes to:

- Provide a complete list of all bodies within each sub-sector as part of setting secondary legislation. This will be able to be referred to by individuals in scope of this policy and their previous or new employers, helping to reduce confusion and complexity.

- Place the majority of local government organisations into a single sub-sector, with decisions on exemptions and waivers taken at by the Full Council in line with the government's commitment to the localism agenda (see Chapter 7).

- Allocate public corporations and some local government bodies to sub-sectors based on the similarity of their workforce or a central government department's policy area. For example, some local government bodies would be allocated to the departmental sub-sector most closely related to their policy. This would mean maintained schools and academies would be grouped together under the Department for Education sub-sector and Cross-Rail under the Department for Transport sub-sector.

- Enable the ONS and some regulators to operate as individual stand-alone sub-sectors so that the recovery and waiver provisions only apply when an individual is re-hired by the same employer (see Chapter 5 for further detail on the rationale).

- Exclude the Bank of England and public broadcasters, including the BBC, Channel 4 and S4C, for the scope of this policy, given the nature of their independence from government. Exclude the Commissioner for Irish Lights from the scope of the policy because it operates cross border, receives no Exchequer funding and has a workforce based in the Republic of Ireland (see Chapter 7).

- Consult again on proposed lists of bodies within each sub-sector as part of a consultation on the policy's regulations.

5.18 It will be for the devolved administrations to determine if and how they wanted to take forward similar arrangements in relation to devolved bodies and workforces. The government has requested Legislative Consent Motions to legislate for the devolved administrations. These discussions are ongoing and when they have concluded the Government will bring forward any necessary amendments to deliver the conclusions reached.

5.19 The government believes that it is fair for recovery to apply to re-employment within the same area or sector of work rather than alternative work across the different sectors. This is proportionate given the size of the public sector labour market.

Individuals in scope

5.20 The government believes that it is unfair for public sector workers to be unduly compensated, at tax payers' expense, for loss of employment where they return after a short period of time. However, the government recognises the diversity of public sector workforces and the flexibility required by public sector employers to manage them effectively. For this reason the government has chosen to target this measure at the top 1% of public sector workers, those earning over £100,000 per annum. This is proportionate and ensures that the top public sector workers lead by example in this area. The government believes for this reason that an earnings threshold better targets this measure than a measure that looks to recover based upon the monetary value of exit payment, as this would also effect some long-serving public sector workers on low to medium salaries.

5.21 The government supports public sector employers that choose to go further in recovery, where they deem appropriate, as the Civil Service within a six month recovery period has done.

5.22 The government will review whether to uprate this earnings threshold every three years using appropriate earnings growth and / or inflationary measures to inform any decision.

5.23 The government initially proposed to include a second earnings threshold of £80,000 per annum where the proportion of exit payment recovered would be reduced. The purpose of the taper was to minimise adverse behavioural effects caused by an earnings cliff edge, for instance individuals not accepting pay increases or reducing their salary shortly before redundancy to ensure that they were not in scope. The government agrees with a number of responses that the taper may be disproportionate in complexity to the behaviours it was designed to address. The government will therefore seek to address these adverse effects through guidance and therefore plans to remove the second earnings threshold.

5.24 The government does not believe that it is fair for high-paid individuals to receive exit payments from the public sector and then return off-payroll to the same or similar role, for instance as a contractor. The government therefore intends to legislate to ensure that these individuals are included within the scope of these proposals.

5.25 However, the government also accepts that in some instances individuals that leave may continue to have a limited form of engagement with the public sector e.g. where an individual is employed by a large consultancy firm. The government believes that in these instances it would be an unfair restriction of trade and likely impose a disproportionate level of complexity and cost to recovery exit payments.

5.26 The government will seek to differentiate between these two groups in legislation and consult on a proposed definition as part of regulations.

5.27 The government intends to allow a casual work limit of 15 days in a 90 day period, in line with the Civil Service Compensation Scheme. This will ensure recovery where an individual returns to significant employment. A waiver mechanism will be available where this provides poor value for money to the tax payer.

5.28 The government's intention is for these provisions to underpin rather than replace any current legislative or non-legislative provisions already in place to ensure that exit payments in the public sector are proportionate and fair.

6 Exit payment types and terms of recovery

6.1 There are a number of different types of payments that employees may be offered on exit of employment. The consultation document set out the intent that the provisions cover a wide range of possible payments to employees in order to ensure it was effective. Payments would be in scope whether the exit payment was paid as part of a standing compensation scheme (such as the Civil Service Compensation Scheme), a one-off arrangement, or under the terms of an individual contract of employment, whether open ended or fixed term.

6.2 Exit payments in relation to injury attributable to employment, serious ill health and ill health retirement were to be excluded from the scope of this policy.

6.3 The consultation document listed the following potential types of exit payments in scope:

- Redundancy payments, both voluntary and compulsory;
- Voluntary exit payments;
- Discretionary payments to buy out actuarial reductions in pensions to allow for early retirement
- Ex gratia payments including special severance payments;
- Payments representing the value of fixed term contracts;
- Payments to facilitate dismissals on efficiency grounds;
- Payments in lieu of notice; and
- Payments with a potential, if not actual, value such as benefits in kind.

6.4 The recovery of employer payments to buy out actuarial reductions to pensions where an individual has an established legal right to an unreduced pension under the scheme rules (e.g. Local Government Pension Scheme) will be excluded, in line with the government's 25 year guarantee for public service pensions.

6.5 The consultation set out that the principle of recovery would be the full cash value if an individual returned to work in an organisation within the same sub-sector within 28 days, and on a pro-rata basis up to 12 months. No payment would be due if an individual returned after 12 months, or to employment outside of the sub-sector from which they exited. The recovery amount would be reduced to take account of: tax and National Insurance contributions, statutory minimum redundancy pay, and where an individual returned on a lower salary based on the proportionate difference in pensionable pay.

6.6 The recovery of discretionary employer payments to buy out actuarial reductions to pensions would be the cash equivalent of the cost to the employer, with allowance for repayments to be made over time. This was preferred to abatement provisions (the individual's pension reduced on re-employment) in line with the approach taken in the recent reforms to public sector pension schemes.

6.7 This section will address responses to the consultation document questions 8, 9, and 10. These questions asked respondents to comment on whether they agreed with the list of exit payments that the government proposed to include within the scope of the recovery mechanism and the proposed terms of recovery.

Summary of responses

Exit payments in scope

6.8 Most submissions raised the potential difficulties of recovery payments made by an employer towards an unreduced pension. These arise mainly because the discretionary payment goes directly to the pension scheme operator, not the individual, and the pension benefits of this payment will be received by the individual over the life of the pension while the obligation to make a repayment falls immediately on the individual. The individual may not therefore be in a financial position to do so. Any agreement to make repayments by instalment would extend, possibly by many years, the relationship between the employee and employer which the exit was meant to remove. A number of contributors expressed that payments towards pensions are a contractual entitlement which should be honoured by the government. An alternative approach put forward was to use abatement.

6.9 In relation to payment type, concerns were raised about recovering settlement agreements in cases of special severance where they relate to injury or infringement of employment rights. This needs to be considered carefully taking account of the potential for individuals to pursue a claim through the courts. Respondents believed that more individuals would seek a court settlement to avoid repaying their exit payment, with increasing litigation leading to higher costs for the government.

6.10 Contributors also cautioned against reclaiming payments for annual leave entitlements because this may be against the Working Time Directive. Payments in lieu of notice were not considered to be related to redundancy and its recovery would force employees to work their notice when an immediate exit may benefit organisational efficiency or restructuring. A further area of concern was the inclusion of benefits in kind, as it could be difficult in some cases to determine a monetary value.

Terms of recovery

6.11 Although respondents broadly agree that payments should be recovered for a return to the public sector within 12 months, some raised questions about the terms which would apply. These were in two main areas: continuity of service and taking into account costs to the individual.

6.12 When an individual returns to the public they would have a break in service, despite repaying some or all of their exit payment. If they were made redundant again they would likely receive a lower redundancy payment or potentially none because exit payments are often based on length of service. A number of contributors suggest that a fair approach would be to credit service corresponding to the payment recovered.

6.13 Secondly, a number of contributors suggest that it would be unfair to consider exit payments as compensation solely related to the loss of employment. An element of exit payments would be for the associated anxiety and stress and further account should be taken for the costs an individual incurs while seeking new employment. In particular, they propose that it would be fair to deduct re-location costs and re-training costs from the recovery amount.

Government response

Exit payments in scope

6.14 Following consultation responses the government intends to include the following payments related to loss of employment within the scope of this policy:

- Redundancy payments, both voluntary and compulsory;
- Voluntary exit payments;
- Discretionary payments made to buy out actuarial reductions in pensions;
- Ex gratia payments such as special severance payments;
- Payments representing the value of fixed term contracts; and
- Payments made to facilitate a dismissal on the grounds of efficiency.

6.15 The government acknowledges that in the case of ex gratia payments such as special severance payments it is often difficult to differentiate between payments that relate directly to loss of employment and other payments that may relate to employer fault (for example, out of court settlements). The use of these types of payments to compensate for loss of employment means that the government intends to include them within the scope of the policy. However, a waiver mechanism will be in place with guidance on when the obligation for the recovery of a payment should be waived. We anticipate that this will be where the purpose of the severance payment did not relate directly to loss of employment.

6.16 The government proposes to also exclude payments or compensation in lieu of notice, where individuals are compensated for their notice period instead of working it. These types of payments would not be recoverable if the individual worked the notice period and are an effective tool to ensure the labour market is flexible at times where change is required quickly. The government therefore proposes to exclude payments and compensation in lieu of notice from the scope of these proposals.

6.17 The government will also exclude payments related to any unused annual leave entitlement.

6.18 The government previously looked to include payments that have a potential, if not actual, monetary value, for example benefits in kind. These could include the non-recovery of the remaining of a loan for a travel season ticket. Non-monetary exit payments are uncommon in the public sector, their inclusion and subsequent calculation of value would likely be complex, given that they are a non-liquid asset, and create an additional cost burden on implementation. The government will therefore also exclude them from the scope of this policy.

6.19 As outlined in the consultation document, the government intends to include discretionary employer payments to buy out actuarial reductions to pensions. This is where an individual receives an unreduced pension early as a result of loss of employment.

6.20 The government acknowledges the difficulty in recovering these payments as the exit payment does not go directly to the individual, instead going to the pension provider. However, it is the government's view that in their recovery these payments can be treated the same as a cash lump-sum payment. Manageable repayment arrangements between employer and ex-employee could be agreed that extend over a number of years. The government will provide guidance on the making of these arrangements.

6.21 The government will exclude the recovery of employer payments to buy out actuarial reductions to pensions where an individual has an established legal right to an unreduced pension under the scheme rules (e.g. Local Government Pension Scheme) will be excluded, in line with the government's 25 year guarantee for public service pensions.

6.22 The government will look to monitor the use of payments both in and out of the scope of these proposals and review those included, where appropriate.

Terms of recovery

6.23 The government welcomes the support from those respondents that agreed with the proposed pro-rated recovery mechanism. The recovery mechanism aims to ensure that where a portion of the exit payment is recovered after 28 days, the individual retains a proportion of the exit payment which corresponds to their loss of earnings for the period they were out of employment.

6.24 The government does not intend to adopt the alternative approach proposed by respondents to pay the exit payment over a 12 month period as this would maintain a relationship, in all cases where an exit payment is made, between employee and employer that the exit was due to remove.

6.25 The government acknowledges that where an individual returns to the same part of the public sector working part-time or on a lower salary it may be argued that an individual has lost a portion of their employment and should therefore have a portion of their exit payment protected from recovery.

6.26 As outlined in the consultation document where an individual returns on a lower salary the amount of exit payment that will be recovered will be reduced proportionately by the difference in pensionable pay. The government will also reduce the portion of exit payment recoverable given the amount of tax that is paid. The government does not propose to allow the employer to recover the tax paid on the exit payment, as the complexity would likely be disproportionate and the emphasis of the policy is to ensure that the individual is not unduly compensated, not reduce the cost of exiting individuals for employers. Recovery of exit payments will not exceed an individual's statutory entitlement.

6.27 In cases where it can be shown that an exit and/or reemployment has resulted in a significant cost being incurred by the individual concerned, the Secretary of State or responsible individual/body, may choose to issue a waiver on a proportion of the exit payment, following government guidance.

6.28 These proposals are intended to underpin rather than replace current exit payment arrangements in the public sector. The government will therefore continue to provide flexibility to compensation schemes and employers to recover more of an exit payment where they view applicable. Please see examples in Annex C of different recovery scenarios.

6.29 The government acknowledges that in some cases where an exit payment is recovered it may be desirable to allow accrued service to be carried forward into future employment.

6.30 The government does not intend to make it a requirement for employers to credit previous employment where a repayment of an exit payment is due, but will look to ensure that they have the flexibility to do so on a case by case basis. The government believes that by delegating this to individual employers and compensation schemes this will allow decisions to be made that best suit the situation.

6.31 The government does not believe mandating employers and compensation schemes to recognise previous service is proportionate given possible complexity where different employers calculate exit payments differently, for example between local government schemes, meaning an individual credited for previous employment could receive a different level of payment if exited again. And where crediting previous service on reemployment would mean that the new employer would take on a liability of a higher exit payment if the individual was to exit again, whilst not receiving the benefits of the recovered exit payment or the individual's service. This could lead to employers being less likely to employ individuals who receive an exit payment.

7 Exceptions and waiver process

7.1 The consultation noted the government's primary motivation for introducing these measures is to make sure exit payments are fair and proportionate, where an individual returns to the same part of the public sector after a short period of time. For this reason, alongside this policy, a provision to enable waivers on repayments to be granted in exceptional circumstances, was proposed. Examples where this provision may be used is where recovery would cause undue hardship or where elements of exit payments may be used for purposes other than compensation for loss of employment, such as to settle disputes or claims.

7.2 All such waivers would be subject to proper disclosure, detailed in departmental accounts in a way consistent with data protection.

7.3 The consultation document set out the default position for bodies covered by Managing Public Money (MPM) Guidance[1] would be that any waiver would require Secretary of State approval, or the approval of individuals/bodies where this had been delegated, subject to Treasury controls and guidance. The relevant Secretary of State would be determined by the department that the body reported to for accounting purposes, with case by case adjustments as required.

7.4 For public corporations, the consultation proposed that approvals for waivers should be sought from the Treasury, who could delegate it to the Shareholder Executive, with the default arrangement that any exceptions must be approved by the Secretary of State for Business.

7.5 For local authorities, the consultation proposed that all exceptions would require the approval of the Full Council, or a meeting of members in the case of fire and rescue authorities. Authorities would be required to publish a policy on limited circumstances in which they would consider granting an exception.

7.6 The consultation also proposed to exclude a number of bodies from the scope of the policy including the Armed Forces, due to the unique features and special requirements of their careers; some public financial corporations, whose assets the government intended to return to the private sector particularly Royal Bank of Scotland, Northern Rock Asset Management and Bradford and Bingley; and the national museums, for the duration of their trial of more commercial freedoms for these institutions.

7.7 This section will address responses to question 15 in the consultation document which asked respondents to comment on whether they agreed with the government's proposed terms for exemption of recovery.

Summary of responses

7.8 All respondents agreed with the proposals to allow repayment to be waived under exceptional circumstances. However, they stated that further guidance should set out these circumstances instead of allowing employers to set their own policy for the waiver regime. For

[1] Managing Public Money: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212123/Managing_Public_Money_AA_v2_-_chapters_annex_web.pdf

example, it may be appropriate to waive recovery when the recovery amount is too small, or to facilitate recruitment to a post where there is an urgency or difficulty in finding suitable candidates.

7.9 Submissions also focused on the potential administrative cost if volumes were high, and appropriate delegation of waiver powers. Most agreed that powers to waive recovery should be delegated so that they are taken by those with knowledge of and oversight over bodies. For example, the Full Council would be responsible for waiver decisions for local authorities, relevant local government bodies.

7.10 A number of representations set out the case for exemption based primarily on preserving a longstanding line of independence from central government. In particular, the BBC, Ofcom and the Bank of England pointed to their unique or statutory status in the public sector.

7.11 A small number of contributors also suggested that non-financial public corporations or museums should be within scope of the recovery provisions on the basis that on a commercial basis was a common across much of the public sector.

Government response

7.12 The government welcomes the support of almost all respondents on the outlined proposals for the waiver. The waiver process will operate by default with the Secretary of State of that sub-sector having to consent, subject to Treasury guidance. The Secretary of State will, however, be able to delegate the responsibility to an appropriate person such as the Accounting Officer.

7.13 The government intends for waivers to be required to be disclosed in departmental accounts in a way that is consistent with rules on data protection and will issue guidance on the waiver process and where waivers should be considered.

7.14 In line with the government's localism agenda Full Council will take the decision whether to grant a waiver from repayment in cases involving Local Authorities and for local government bodies where they have been delegated the responsibility.

7.15 It will be for the devolved administrations to determine if and how they wanted to take forward similar arrangements in relation to devolved bodies and workforces. The government has requested Legislative Consent Motions to legislate for the devolved administrations. These discussions are ongoing and when they have concluded the Government will bring forward any necessary amendments to deliver the conclusions reached.

7.16 The government proposes that for the Office of National Statistics and some regulators each body will operate its own sub-sector and have responsibility over their own waiver. This recognises the independence status of these bodies. This means that individuals will only fall in scope of this policy where they leave and return to the same employer.

7.17 The government proposes to exclude the Bank of England and public broadcasters, including the BBC, Channel 4 and S4C, from the scope of this policy given the nature of their independence from government. The government also proposes to exclude of the Commissioner for Irish Lights, given the unique nature of the organisation.

7.18 The government believes that the exclusion of some financial corporations, as these bodies return to the private sector; and national museums, for the period of their trial to run on a more commercial basis, will ensure value for money for the tax payer. The exclusions of the Armed Forces is also correct given the unique nature of their careers.

8 Legislative timetable, compliance and enforcement

8.1 The government proposed that the legal obligation for the individual to repay exit payments would be set in legislation and would form part of the contractual terms of an individual's departure.

8.2 These measures form part of the BIS Small Business Enterprise and Employment Bill which was introduced on 25 June 2014 and had its second reading in the House of Commons on 16 July 2014.

8.3 The current timetable is for the Bill to receive Royal Assent by April 2015. Following Royal Assent secondary legislation will be prepared by the Treasury and relevant bodies for their sub-sectors in time for implementation by April 2016.

8.4 The consultation noted that the onus would be on the individual to notify their new and previous employer that a portion of their exit payment would need to be repaid. The consultation also proposed that employers would be required to request the individual inform them whether they have received an exit payment in scope of the policy in the last 12 months as part of normal pre-employment checks, and to include in employment contracts the right to dismiss employees who have breached the requirement to repay.

8.5 The government anticipates publishing guidance on the operation of the policy, including the mechanisms by which individuals are informed of their obligation, waiver situations and criteria, and records that will be expected to be kept to ensure effective monitoring of compliance with the legislation.

8.6 This section will address responses to question 11 in the consultation document which asked respondents to comment on the government's proposed measures for compliance and enforcement of recovery of exit payments.

Summary of responses

8.7 A common theme raised by respondents was that administering the policy could be complex. Implementation of the policy would need to be supported by guidance which makes it clear what the obligations are on the employee, the exiting and hiring employer. Respondents suggested that the exiting employer should make these obligations clear for the individual and that a clear list of sub-sectors should be made available at the point of exit as well as a pre-employment declaration after a job offer but before the start of employment to avoid any potential for recovery obligations to influence the decisions taken in recruitment process.

8.8 Some respondents also suggested that the government should provide a standard clause to employers for compromise agreements in relation to their recovery obligations.

Government response

8.9 The government welcomes the overwhelming majority of respondents that supported the government's proposal that the main obligation should be on the individual to ensure they repay the exit payment where they return to the public sector. Where this does not occur the new employer will have the ability to terminate the engagement and the old employer to seek repayment through the courts.

8.10 The government, however, notes respondents concerns that enforcement and monitoring will be difficult. To combat this the government will look to put obligations on the new and old employers through secondary legislation and/or guidance.

8.11 Current proposals are to require the old employer to:

- Inform the individual of their obligations as part of exit payment agreement;
- Retain sufficient records to allow for calculation of the amount of money due to be repaid, in line with Treasury guidance;
- Agree repayment arrangements with ex-employee once informed that the individual intends to return to work in the same sub-sector of the public sector;
- Inform the new employer where repayment arrangements have been made;
- Ensure that the exit payment is recovered;
- Where applicable record in Annual Report and Accounts details of the waiver.

8.12 The new employer to:

- Conduct pre-appointment checks, re-informing the individual of their obligation;
- Delay engagement until after confirmation from the old employer that arrangements for repayment have been made;
- Inform the old employer the date the individual is planned to be engaged from;
- Provide details of the individual's new salary for calculation purposes.

8.13 For the individual responsible for the waiver:

- Retain records of the waiver and justifications.

8.14 The government will provide guidance of where the obligation for recovery should be waived.

A List of respondents

A.1 The following organisations submitted responses to the consultation:

Association of Colleges

Association of Local Authority Chief Executives (ALACE)

Association of School and College Leaders (ASCL)

Audit Commission

BBC

Boston Borough Council

British Medical Association (BMA)

Channel 4

CIPFA

Colchester Borough Council

Deloitte

Derbyshire Fire & Rescue Service

Eden District Council

Employment Lawyers Association

FDA - senior managers and professionals trade union

Hertfordshire County Council

Lancashire Fire & Rescue

Local Government Association

Managers in Partnership (MiP)

National Association of Head Teachers (NAHT)

NHS Employers

Royal College of Nursing (RCN)

South Hunsley School and Sixth Form College

The National Physical Laboratory (NPL)

Unison

West Yorkshire Police

Wyre Forest District Council

B Definitions and terms

B.1 The term **compensation or exit payment** is used here to refer to any financial or non-financial transfer to an employee from the employer which does not represent remuneration for normal ongoing activities that are part of their employment. This excludes for example: wages, salaries, allowances, regular non-financial benefits packages such as a company car, or employer pension contribution.

B.2 The government is primarily interested in compensation and exit payments which are made on termination of employment, redundancy, or unplanned loss of employment or loss of office. Such payments are sometimes referred to as **staff exit payments** and serve to achieve the following:

- **Supporting reform and reorganisation of the public sector** – facilitating at all levels, from top to bottom, organisational restructuring, downsizing and preparations for fundamental change in the provision of services;
- **Support individuals made redundant while they find new employment** – providing individuals with financial support that reflects their length of service to their employer and helping bridge the gap to new employment;
- **Compensate for loss of expected earnings or to counter any legal claims** – for example where there is a disagreement in the processes by which the individual was managed either before or during the exit;
- **Facilitate the departure of individual staff** able to perform at levels that may be adequate in some circumstances but no longer meet the organisation's direction or need.

B.3 In doing the above, exit payments should provide value for money, be set at a level corresponding with the expected benefit to the organisation of exiting the individual, satisfy the employees' statutory entitlements under the Employment Acts; avoid or minimise claims for unfair dismissal or breach of contract; and have regard to the value of past service to the employer. Payments are also made by employers in relation to injury, ill-health or death during employment; these are not in scope of this consultation.

B.4 Exit payments may take a number of forms including:

- **Cash lump sum** – such as a **redundancy payment** which is normally calculated on the basis of salary at the point of exiting the organisation and length of service.
- **Early access to unreduced pension** – for employees close to the relevant pension scheme's normal pension age some employers offer the option to take early retirement on a pension with the reduced amount for early payment being met by the employer, or otherwise enhanced, in place of or in addition to a cash lump sum compensation payment.
- **Non-financial and other benefits** – in a smaller number of instances, employers may offer other benefits such as additional paid annual leave at the end of an individual's employment.

B.5 Due to their related nature, the government is also interested in what are termed **special severance payments**, special payments or ex-gratia payments where are another form of exit payment. Such payments are generally defined as a payment made to the employee outside their basic statutory or contractual entitlement, upon unplanned termination of their employment contract. They may be paid where an employee is dismissed, or agrees the termination of their contract in a settlement agreement (a legally binding contract, used either to settle statutory disputes or claims, or disputes or claims under an individual employment contract). Special severance payments may also be paid in order to settle current legal proceedings such as an Employment Tribunal claim.

C Illustrative examples of recovery calculations

C.1 A public servant with 14 years' service earning a salary of £100,000 receives a redundancy payment of £116,700 (before tax) or 14 months pensionable pay. They then take up a position in the same public sector sub-sector after two months from exit and on a lower salary of £90,000.

Details of calculation

Step 1 – base amount to be recovered:

£116,700 (original payment) - £16,700 (two months' pay to be retained) = £100,000

Step 2 – adjustment of base amount to account for lower salary in new role:

£100,000 (recoverable amount) x £90,000 (new salary) / £100,000 (salary at exit) = £90,000

Step 3 – a further reduction would be applied to take account of tax paid or statutory redundancy entitlement at the time of exit.

Total to be recovered (excluding tax adjustment) = £90,000

C.2 A public servant with 14 years' service earning a salary of £120,000 receives a redundancy payment of £140,000 (before tax) or 14 months pensionable pay. They then take up a part-time position in the same public-subsector after eight months from exit on a salary of £50,000 p.a.

Details of calculation

Step 1 – base amount to be recovered:

£140,000 (original payment) - £80,000 (eight months' pay to be retained) = £60,000

Step 2 – adjustment of base amount to account for lower salary in new role:

£60,000 (recoverable amount) x £50,000 (new salary) / £120,000 (salary at exit) = £25,000

Step 3 – a further reduction would be applied to take account of tax paid or statutory redundancy entitlement at the time of exit.

Total to be recovered (excluding tax adjustment) = £25,000

C.3 A public servant with 6 years' service earning a salary of £120,000 receives a redundancy payment of £60,000 (before tax) or 6 months pensionable pay. They then take up a position in the same public-subsector after eight months from exit on a salary of £120,000.

There is no recovery because they have returned to the public sector after the six months notional period of compensation.

C.4 A public servant with 14 years' service earning a salary of £120,000 receives a redundancy payment of £140,000 (before tax) or 14 months pensionable pay. They then take up a position in the same public-subsector after thirteen months from exit on a salary of £120,000.

There is no recovery because they have returned to the public sector after twelve months.

HM Treasury contacts

This document can be downloaded from www.gov.uk

If you require this information in an alternative format or have general enquiries about HM Treasury and its work, contact:

Correspondence Team
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

Tel: 020 7270 5000

Email: public.enquiries@hmtreasury.gsi.gov.uk